LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 21 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 304

SAMUEL D. CARTHAN,

Petitioner,

—against—

SHERIFF, CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EVSEROFF, NEWMAN & SONENSHINE,
Attorneys for Petitioner,
Office & Post Office Address,
186 Joralemon Street,
Brooklyn 1, New York.

UL 5-1111

WILLIAM SONENSHINE,
Member of the Bar of the
Supreme Court of the
United States,
Of Counsel.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTIONAL GROUNDS IN THIS COURT	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
FACTS MATERIAL TO THE QUESTIONS PRESENTED	5
JURISDICTIONAL GROUNDS IN THE DISTRICT COURT	6
ARGUMENT:	
I. Section 1123 (formerly Section 903) of the New York City Charter is Unconstitutional, and Consequently, the Waiver of Immunity Executed under its Compulsion is Invalid and Inoperative	7
II. The Grand Jury in Kings County Has No Power to Compel the Production of Either Federal Tax Returns or New York State Tax Returns	15
CONCLUSION	19
APPENDICES:	
(A) Opinion of the United States Court of Appeals	21
(B) Opinion, New York Supreme Court, Kings County	25
(C) U. S. Constitution, 5th Amendment	30
(C) U. S. Constitution, 14th Amendment	30

PAGE

(C) New York City Charter, §1123..... 30

(C) New York State Tax Law, §384..... 31

(C) U. S. Code, Title 26, §6103..... 32

(D) Petition for Writ of Habeas Corpus..... 35

(E) U. S. Code, Title 28, §2241..... 39

(E) U. S. Code, Title 28, §2254..... 39

Cases Cited

Application of Manufacturers Trust Co., 269 App. Div. 108.....17, 18

Cohen v. Hurley, 366 U. S. 117.....13, 14

McGowan v. Maryland, 366 U. S. 420.....12, 13, 15

People v. Isaac G. Johnson & Co., 213 App. Div 402.. 17

Slochower v. Board of Education, 350 U. S. 551..... 8-12

Steuding; People v., 6 N. Y. 2d 214..... 12

Torasco v. Watkins, 367 U. S. 488..... 14

U. S. v. Ullman, 350 U. S. 415..... 12

U. S. v. Baltimore Post Co., 2 F. 2d 761, aff'd 268 U. S. 388..... 15

Wieman v. Updegraff, 344 U. S. 183..... 14

Statutes Cited

New York City Charter, Section 1123.....3, 4, 7, 12, 13, 15

New York State Tax Law, Section 384..... 16

United States Code, Annotated, Title 26, Section 6103 15

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No.

SAMUEL D. CARTHAN,
Petitioner,

—against—

SHERIFF, CITY OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit, as follows:

A. Opinions Below

The United States Court of Appeals for the Second Circuit, by judgment entered on April 6, 1964, unanimously affirmed an order of the United States District Court for

the Eastern District of New York denying the above-named petitioner's petition for a writ of habeas corpus. The order of the United States District Court was entered in that Court on November 20, 1963. No opinion was written in connection therewith.

The opinion of the United States Court of Appeals for the Second Circuit (reported at 330 F. 2d 100) is set forth in Appendix A hereto. Also appended hereto is a copy of the opinion of Mr. Justice MILES F. MCDONALD, a Justice of the Supreme Court of the State of New York, County of Kings, preceding the holding of this petitioner in contempt of that Court by order dated December 17, 1962. Said order of contempt is the underlying order directing petitioner's imprisonment and fine, which was the subject matter of the writ of habeas corpus in the United States District Court as aforesaid. The opinion of Mr. Justice MCDONALD is reported unofficially at 234 N. Y. S. 2d 64 and is appended hereto as Appendix B.

There were no other opinions written in any other Courts which considered this case as hereinafter set forth.

B. The Grounds on Which the Jurisdiction of This Court Is Invoked.

Jurisdiction of this Court is invoked under Title 28, §1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1, of the Rules of this Court.

Time to file this petition was extended to August 17, 1964, by the Honorable JOHN M. HARLAN, an Associate Justice of this Court, by order dated June 30, 1964.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on April 6, 1964, as aforesaid.

C. The Questions Presented for Review.

(1) Does §1123 of the New York City Charter (set forth in full in Appendix C of this petition) violate the Fifth Amendment to the United States Constitution by providing that New York City employees who refuse to partially waive their privilege against self-incrimination before a Grand Jury must, as a consequence, automatically forfeit their position and employment?

(2) Is such section unconstitutional in that it would deprive petitioner of his liberty and property without due process of law under the Fourteenth Amendment to the United States Constitution by compelling him to partially waive his privilege against self-incrimination or forfeit his position and employment and thereby affect his property rights in and to the pension provided for him by the City of New York?

(3) Is such section unconstitutional in that it operates to arbitrarily deprive petitioner of due process of law and the equal protection of the laws under the Fourteenth Amendment to the United States Constitution by mandating his loss of employment upon refusal to execute a limited waiver of his constitutional privilege against self-incrimination irrespective of whether or not he has been in fact guilty of any wrongdoing?

(4) May the exercise of the privilege against self-incrimination after having executed a written limited waiver of said privilege in the circumstances more fully set forth below furnish a lawful basis for a State to punish by imprisonment and monetary fine the assertion of said privilege as a contempt of Court?

(5) May the refusal to produce income tax returns upon the grounds aforesaid before a Grand Jury furnish a basis for imprisonment as a contempt of Court where the petitioner had previously waived immunity but asserts that the section of the New York City Charter is unconstitutional in compelling his limited waiver of immunity as an alternative to forfeiting his employment?

(6) May a Grand Jury, in any circumstances, lawfully compel the production of Federal or New York State income tax returns?

In connection with the foregoing, it is respectfully urged, for the reasons and upon the facts hereinafter set forth, that the issues involved herein have resulted in a decision by a State Court upon Federal questions of substance not theretofore determined by this Court and probably not in accord with applicable decisions of this Court. It is further respectfully urged that the Court of Appeals for the Second Circuit has decided, by its decision below, important questions of Federal law which have not been, but should be, settled by this Court, and has decided Federal questions in a way in conflict with applicable decisions of this Court.

D. Constitutional Provisions and Statutes Involved.

(1) The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution.

(2) The statutes involved are §1123 of the New York City Charter, §384 of the New York State Tax Law, and §6103 of Title 26 of the United States Code.

All of the foregoing are set forth in Appendix C to this petition.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented.

(1) Petitioner is an employee of the City of New York, to wit: a plastering inspector employed in its Department of Buildings.

(2) Petitioner was subpoenaed before a Grand Jury in Kings County which had commenced an inquiry into whether crimes were committed in connection with the construction of certain residential homes in Kings County. Rather than forfeit his position, petitioner executed a limited waiver of immunity and commenced testimony before said Grand Jury. At the direction of the Grand Jury he submitted a completed questionnaire as to his financial resources and income during the years 1959, 1960 and 1961.

(3) Thereafter, petitioner was served with a subpoena *duces tecum* directing him to produce for the Grand Jury his Federal and New York State income tax returns for the years 1959, 1960 and 1961.

(4) Petitioner appeared before said Grand Jury in response to said subpoena and declined to furnish said income tax returns, alleging that he was not required by law so to do for the reasons set forth in his petition for a writ of habeas corpus (Appendix D).*

He further stated to the Grand Jury that the waiver of immunity was executed by him under the compulsion imposed by the New York City Charter, §1123, which mandated that he forfeit his employment in the event of his refusal to execute such a waiver.

---

* The facts alleged therein were conceded by the District Attorney in the District Court.

(5) Thereafter, and on December 17, 1962, petitioner was adjudged in criminal contempt of the Supreme Court of the State of New York by reason of his refusal to produce said tax returns and was sentenced to a term of imprisonment of 30 days and a fine of $250 or an additional 30 days' imprisonment in default of said payment.

(6) Said order of contempt was affirmed on appeal without opinion by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. A simultaneous petition for a writ of habeas corpus to the aforesaid Appellate Division was also dismissed. A further application to the Court of Appeals of the State of New York for leave to appeal to that Court was denied. Petitioner thus exhausted all his remedies in the courts of the State of New York.

(7) A petition for a writ of habeas corpus was thereupon brought in the United States District Court for the Eastern District of New York on November 20, 1963, which petition was denied on said date by the Honorable WALTER BRUCHHAUSEN, a Judge of said Court.

(8) Thereafter a timely appeal was taken to the United States Court of Appeals for the Second Circuit, and on April 6, 1964, the said Court handed down its decision affirming the decision of the District Court. Judgment to that effect in the United States Court of Appeals was entered on said date.

F. Basis for Jurisdiction in the United States District Court.

Jurisdiction in the United States District Court for the Eastern District of New York was predicated upon §§2241

and 2254 of Title 28 of the United States Code. Said sections are set forth herein in Appendix E.

G. Argument Amplifying the Reasons Relied on for the Allowance of the Writ.

POINT I

Section 1123 (formerly Section 903) of the New York City Charter is unconstitutional, and consequently, the waiver of immunity executed under its compulsion is invalid and inoperative.

It is our position herein that the waiver of immunity was executed under duress and compulsion imposed by force of the penalty created by Section 1123, in the event of a refusal to execute the waiver. Section 1123 provides as follows:

> "Failure to Testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employ-

ment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

If, as we urge herein, the pressure exerted upon appellant by Section 1123 was unlawful, then the waiver of immunity executed thereunder was not binding upon appellant and he could properly raise his constitutional privilege with impunity.

We commence our argument by noting certain undeniable practicalities. A person subject to Section 1123 is faced with the dilemma, when subpoenaed by a Grand Jury, of surrendering either his constitutional privilege or his employment. He may or may not be innocent of any wrongdoing. Yet if he takes unto himself that which the State and Federal Constitutions say is his as of right, he must, nevertheless, without further ado, pay the price exacted by the City.

This section was before this Court in *Slochower* v. *Board of Education*, 350 U. S. 551. It was there stated at pages 555-559:

> "Slochower argues that §903 abridges a privilege or immunity of a citizen of the United States since it in effect imposes a penalty on the exercise of a federally guaranteed right in a federal proceeding. It also violates due process, he argues, because the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the State to terminate his employment. Appellee insists that no question of 'privileges or immunities' was raised or passed on below, and therefore, directs its argument solely to the proposition that §903 does not operate in an arbitrary or capricious manner. We do not decide whether a claim under the 'privileges or immunities' clause was

considered below, since we conclude the summary dismissal if appellant in the circumstances of this case violates due process of law.

"The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. *Adler* v. *Board of Education*, 342 U. S. 485, upheld the New York Feinberg law which authorized the public school authorities to dismiss employees who, after notice and hearing, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim. Likewise *Garner* v. *Los Angeles Board*, 341 U. S. 716, 720, upheld the right of the city to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for the public service,' including their membership, past and present, in the Communist Party or the Communist Political Association. There it was held that the city had power to discharge employees who refused to file an affidavit disclosing such information to the school authorities.

"But in each of these cases it was emphasized that the State must conform to the requirements of due process. In *Wieman* v. *Updegraff*, 344 U. S. 183, we struck down a so-called 'loyalty oath' because it based employability solely on the fact of membership in certain organizations. We pointed out that membership itself may be innocent and held that the classification of innocent and guilty together was arbitrary. This case rests squarely on the proposition that 'constitu-

tional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.' 344 U. S., at 192.

"Here the Board, in support of its position, contends that only two possible inferences flow from appellant's claim of self-incrimination: (1) that the answering of the question would tend to prove him guilty of a crime in some way connected with his official conduct; or (2) that in order to avoid answering the question he falsely invoked the privilege by stating that the answer would tend to incriminate him, and thus committed perjury. Either inference, it insists, is sufficient to justify the termination of his employment. The Court of Appeals, however, accepted the Committee's determination that the privilege had been properly invoked and it further held that no inference of Communist Party membership could be drawn from such a refusal to testify. It found the statute to impose merely a condition on public employment and affirmed the summary action taken in the case. With this conclusion we cannot agree.

"At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown* v. *Walker*, 161 U. S. 591, 610. We have reaffirmed our faith in this principle recently in *Quinn* v. *United States*, 349 U. S. 155. In *Ullman* v. *United States*, 350 U. S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege

against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullman*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See Griswold, The Fifth Amendment Today (1955).

"With this in mind, we consider the application of §903. As interpreted and applied by the state courts, it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman* v. *Updegraff supra*. * * *.

"This is not to say that Slochower has a constitution right to be an associate professor at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law."

Slochower, of course, dealt with a discharge from employment by virtue of a refusal to answer as mandated by Section 1123. At bar, we deal with incarceration for criminal contempt predicated upon a refusal to answer. The State urges that the privilege of self-incrimination was waived. Petitioner urges that the waiver was ineffective because of the coercion arising from an illegal statute. In either event, Section 1123 dilutes the privilege created by the State and Federal Constitutions. In either event, a person who seeks the protection of the Constitution must expose himself to a penalty. The privilege against self-incrimination being an absolute right, it cannot be attenuated or curtailed by legislative fiat. (See, e.g., *People* v. *Steuding*, 6 N. Y. 2d 214.)

This latter principle was alluded to by Mr. Justice DOUGLAS in his dissenting opinion in *Ullman* v. *United States*, 350 U. S. 415, 454, who noted that "the critical point is that the Constitution places the right of silence *beyond the reach of government.*" (Italics in original text.)

In the final analysis, any view upholding Section 1123, must carry with it the concomitant view that the City of New York may annex conditions to the exercise of rights which are constitutionally unconditional. This, we submit, ought not to be allowed.

We urge further that Section 1123 operates to deprive city employees of the equal protection of the laws guaranteed to them by the Federal Constitution. (U. S. Constitution, Amendment XIV.) Among this Court's more recent expositions on the subject was *McGowan* v. *Maryland*, 366 U. S. 420 (1961). The Court there upheld certain Sunday laws enacted by the State of Maryland. The Court summed up a long line of decisions by pointing out at 366 U. S. 425:

"The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some gr os of citizens differently than others. The constitutional safeguard is offended only if the classification rests on the grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably ma be conceived of to justify it. See *Kotch* v. *Board of River Port Pilot Com'rs*, 330 U. S. 552, 67 S. Ct. 910, 91 L. Ed. 1093; *Metropolitan Casualty Ins. Co. of New York* v. *Brownell*, 294 U. S. 580, 55 S. Ct. 538, 79 L. Ed. 1070; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369; *Atchison, T. & S.F. R. Co.* v. *Matthews*, 174 U. S. 96, 19 S. Ct. 609, 43 L. Ed. 909."

In *Cohen* v. *Hurley*, 366 U. S. 117, 130 (1961), the Court, in dealing with the equal protection clause as it applied to lawyers who raised the privilege during disbarment proceedings, asserted that "what procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented . . ."

Applying these principles to the situation at bar gives rise to the conclusion that Section 1123 classified City employees into two groups—those who assert their constitutional rights and those who do not. It is not insignificant that an innocent man who claims the privilege must sacrifice his position to do so. But a wrongdoer who testifies

retains his position unless it be first shown after hearing that he is otherwise unfit to continue in his employment. Such a distinction is patently unreasonable. If the objective of the City is to be enabled to ascertain whether its employees are fit to carry out their duties, it is difficult to see how a rational result can be obtained by discharging those who embrace the rights accorded them. To the contrary, there is inherent in Section 1123 a device for compelling innocent employees to subject themselves to prosecution arising from ambiguous circumstances. The same device, ironically, may compel the City to continue to employ a wrongdoer who testifies with sufficient glibness to dispel otherwise justifiable doubts as to his honesty.

Thus, Section 1123 ultimately depends for its constitutionality on the assumption that the exercise of the privilege *per se* warrants a finding of disability to hold the particular employment. This was condemned in *Slochower*.

Mr. Justice CLARK, in *Wieman* v. *Updegraff*, 344 U. S. 183, 192, said:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

This view has been reaffirmed subsequent to *Cohen* v. *Hurley*. *In Torasco* v. *Watkins*, 367 U. S. 488, Mr. Justice BLACK, wrote, at pages 495-496:

> "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman* v. *Updegraff*, 344 U. S. 183."

The classification effected by Section 1123 therefore "rests on the grounds wholly irrelevant to the achievement of the State's objective" (*McGowan* v. *Maryland, supra*).

POINT II

The Grand Jury in Kings County has no power to compel the production of either Federal Tax Returns or New York State Tax Returns.

Congress has enacted restrictions upon compulsory disclosure of Federal Tax Returns. Section 6103 of Title 26 of the United States Code Annotated provides for publicity of returns only in certain instances. Thus, certain returns may only be inspected upon order of the President under rules and regulations approved by him. State bodies or commissions may only inspect returns when such inspection is upon the request of the Governor of that state. In the latter instance such inspection may even then only be had for the "administration of the tax laws of such state."

It appears to be self-evident that all laws relating to the Federal Income Tax are exclusively within the legislative province of Congress. If Congress chooses (as it has) to limit the circumstances in which Federal Tax Returns may be disclosed, the State cannot determine for itself whether or not to heed those prohibitions. To do so would be to encroach upon an area reserved by the United States Constitution to the Federal Government. As was pointed out in *U. S.* v. *Baltimore Post Co.*, 2 Fed. 2d 761, 764, affirmed 268 U. S. 388, 45 S. Ct. 560:

> "Doubtless Congress may determine (except in so far as it may be restrained by Constitutional prohibition), in setting the policy of the laws of taxation, how much or how little publicity of income returns shall be given."

We, therefore, respectfully submit that the subpoena power of a State Grand Jury cannot extend to compel production of Federal Income Tax Returns. An attempt by a Grand Jury to subpoena such returns would violate the witness's right to due process of law as guaranteed by the Federal Constitution.

With respect to State Tax Returns the same principles are involved. The statutory restrictions governing the disclosure of information reported by a taxpayer in his tax return are found in Section 384 of the New York State Tax Law which provides, in pertinent parts, as follows:

> "Secrecy required of official; penalty for violation. 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner, any officer or employee of the department of taxation and finance * * * to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this article. The officers charged with the custody of such reports and returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court * * *."

The statute goes on to enumerate certain exceptions not pertinent herein. Criminal sanctions and forfeiture of office are imposed for violation of the section.

It need not, of course, come as any surprise that the legislature has seen fit to impose an almost inexorable barrier of secrecy upon tax returns. The taxing power of any government is vital to its existence. Under our system of reporting taxable income, the initial information is supplied by the taxpayer himself. Investigation into the propriety of the return follows rather than precedes it. Yet,

because of the sheer impossibility of verifying each return, the government must perforce rely for the most part upon the honesty of the taxpayer. This, in turn, makes it imperative that a taxpayer feel confident that his tax return will remain a matter strictly between himself and the state. It does not require much in the way of imagination to visualize the abuses to which tax returns can be put if allowed to go beyond the confidential files of the state. Included in the ambit of abuse would be found instances ranging from idle curiosity to criminal extortion.

Such an interpretation was placed upon Section 384 by Mr. Justice DOWLING, speaking for the First Judicial Department in *People* v. *Isaac G. Johnson & Co.*, 213 App. Div. 402, 210 N. Y. S. 92:

> "But in my opinion no 'proper judicial order' can be made except in an event when the integrity of the report itself is attacked or defended as the main, and not merely the collateral issue.
>
> "To permit the use of such reports in an ordinary case is to destroy the secrecy attaching to them and to break down the protection which the statute gives to taxpayers in the disclosure of their most intimate business affairs to the taxing power."

Some years later, that same court had occasion to elaborate in greater detail. In *Application of Manufacturers Trust Co.*, 269 App. Div. 108, 53 N. Y. S. 2d 923, the Court said:

> "Petitioner urges that the Legislature may not preclude the courts from exercising the power to direct publication of tax returns because such limitation would, in violation of the Constitution, unlawfully curb the functions of the judiciary. However, the object of the secrecy provisions is to assure every taxpayer making

returns that the information therein contained will remain confidential and will be used only for the purpose of computing his tax. The statute indicates legislative determination that such returns shall not be used as evidence in the ordinary case and shall not, without the taxpayer's consent, be employed for any purpose other than that stated in the statute. (Citing cases.) Such objective is wholly reasonable; the statute, as we interpret it, is not violative of any Constitutional principle and the Legislature may enact such rule (citing cases).

"It has uniformly been held that the federal and state governments have power to provide that returns made to their officers shall not be revealed by the officers (citing cases). In *Oklahoma Tax Commission* v. *Clendinning, supra,* 145 P. 2d at page 146, 151 A. L. R. 1055, the courts, in passing upon a similar statute summarized the pertinent principles as follows: 'No one questions the power of the Legislature to so give tax returns this confidential and privileged status. Similar provisions are applied to income tax returns, and to various other reports and returns to the Federal Internal Revenue Department. It is not pointed out where any authority has ever denied the power to so provide. The meaning of our statute above quoted is unequivocal and it needs no construction. It means what it says and must be followed by all, including this court and the respondent District Judge. This act constitutes the state's compact and pledge to the taxpayer that this tax return shall be kept inviolate, confidential and privileged, and not disclosed to anyone, nor in any manner, except as specifically authorized by the act itself, and will be used only for the purposes specifically provided.' "

The Grand Jury is seeking to arrogate unto itself powers which the state itself has denied to the courts. It seeks to do by indirection that which it is forbidden to do directly, viz., inquire into the confidential communication between taxpayer and state.

Analogy, if any be needed, is found in the doctrine which engendered the necessity of all privileged communications, i.e., attorney-client, doctor-patient, priest-penitent. At the base is always found a social policy deemed by the state to override the considerations of a particular case. Undoubtedly there are those who will argue that the denial of the order sought by the Grand Jury at bar will hamper their investigation and set justice at naught. The difficulty with such an approach is that the same power which created that grand jury has also, in its wisdom, seen fit to limit the grand jury's power in regard to tax returns just as it has limited the grand jury in regard to other confidential communications.

CONCLUSION

The issues presented are of sufficient nationwide importance to warrant the granting of a writ of certiorari.

Dated: Brooklyn, New York
July, 1964.

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE,
Attorneys for Petitioner Samuel D. Carthan.

WILLIAM SONENSHINE, Esq.
Of Counsel.

[APPENDICIES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 329—September Term, 1963.

(Argued March 9, 1964 Decided April 6, 1964.)

Docket No. 28610

UNITED STATES *ex rel.* SAMUEL D. CARTHAN,

Appellant,

v.

SHERIFF, CITY OF NEW YORK,

Appellee.

Before:

SMITH, KAUFMAN and MARSHALL,

Circuit Judges.

Appeal from denial of petition for writ of habeas corpus in the United States District Court for the Eastern District of New York, Walter Bruchhausen, *District Judge.*

Affirmed.

Appendix A

WILLIAM SONENSHINE, Brooklyn, New York (Evseroff, Newman & Sonenshine, Brooklyn, New York, on the brief), *for appellant.*

IRVING P. SEIDMAN, Asst. District Attorney, Kings County, New York (Edward S. Silver, District Attorney and Aaron E. Koota, Chief Asst. District Attorney, Kings County, on the brief), *for appellee.*

SMITH, Circuit Judge,

Appellant is under sentence of imprisonment for criminal contempt of court, imposed by the Supreme Court of the State of New York for the County of Kings for refusal to produce income tax returns requested by the Grand Jury. The sentence was affirmed by the Appellate Division and a writ of habeas corpus was dismissed. Leave to appeal to the Court of Appeals was denied. Appellant thereupon petitioned the United States District Court for the Eastern District of New York for a writ of habeas corpus. The District Court, Walter Bruchhausen, *District Judge*, denied the petition and relator appealed. We find no error and affirm the order denying the writ.

Appellant, a plastering inspector employed by the City of New York, was subpoenaed to testify before a Grand Jury investigating possible corruption in the Building Department of the City of New York in connection with home building in Kings County. He appeared before the Grand Jury and executed a Limited Waiver of Immunity pursuant to Section 1123 of the New York City Charter (formerly Section 903), which requires a city employee subpoenaed before a Grand Jury to waive his privilege against self-incrimination with respect to city affairs or forfeit his office

and his eligibility to appointment to city office or employment. He testified before the Grand Jury and later, at the request of the Grand Jury, submitted financial questionnaires for the years 1959, 1960 and 1961. However, when subsequently subpoenaed to produce copies of his State and Federal income tax returns for 1959, 1960 and 1961, he admitted that he had the returns but refused to produce them. Directed by the court to appear and produce the returns, 234 N. Y. S. 2d 64 (Sup. Ct. 1962), he again appeared and again refused. On motion to punish for contempt the order was repeated and appellant again refused. Thereupon, he was adjudged in contempt and sentenced to imprisonment for 30 days and to a fine of $250 or an additional 30 days imprisonment.

Appellant exhausted his state remedies by appeal to the Appellate Division, where the conviction was affirmed and an application for writ of habeas corpus dismissed, and by application for leave to appeal to the Court of Appeals, which was denied. See *Fay* v. *Noia*, 372 U. S. 391, 415-420 (1963).

Appellant argues two points, that Section 1123 is an unconstitutional limitation on the privilege against self-incrimination, and that the Grand Jury lacked power to order the production of federal and state income tax returns.

The second ground appears to be without substance. The disclosure of tax returns which is forbidden by both federal and state law to protect the integrity of the tax reporting and collecting system is an unauthorized disclosure of the filed returns, directed primarily against employees of government in the taxing departments. Disclosure by the taxpayer himself of his copies of returns is not an unauthorized disclosure, even though it be made by reason of legal com-

pulsion. *United States* v. *O'Mara*, 122 F. Supp. 399 (D. D. C. 1954), *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 1 F. R. D. 190, 192 (D. Conn.).

The first ground is more troublesome, for restrictions on the constitutional privilege against self-incrimination are not favorably regarded. However, the Supreme Court has recognized that public bodies have the right to expect public employees to give frank replies to questions relevant to an employee's fitness to hold public office. *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Garner* v. *Board of Public Works*, 341 U. S. 716 (1951). And in *Regan* v. *New York*, 349 U. S. 58 (1955), the Court sustained the contempt conviction of a New York policeman who had refused to testify before a Grand Jury about the acceptance of bribes from gamblers. A New York statute then in force provided that testimony relating to bribery could not be withheld because of the privilege against self-incrimination, but conferred immunity from prosecution for any criminal activity revealed by such testimony. In order to retain his job with the city, Regan executed a waiver of immunity from subsequent prosecution and appeared before the Grand Jury. When he balked at telling whether he had received any bribes, Regan was convicted of criminal contempt. The Supreme Court held that since he had signed the waiver, Regan "was not deprived of any constitutional rights in being punished for his failure to testify." 349 U. S. at 62.

We need not go so far to sustain the appellant's contempt conviction. Appellant knowingly waived his privilege against self-incrimination with respect to city affairs. Unlike Regan, he submitted financial questionnaires. Having taken advantage of the waiver to hold his job and having already undertaken to disclose his financial affairs to the Grand Jury, appellant cannot cry halt because the inquiry

has gone into greater depth than he had anticipated. Once he waives his privilege against self-incrimination, a witness may not withdraw his waiver to prevent matters which he has already gone into from being explored in greater detail. See *Brown* v. *United States*, 356 U. S. 148 (1958); *Rogers* v. *United States*, 340 U. S. 367 (1951).

The judgment denying the writ is affirmed.

APPENDIX B

Opinion, New York Supreme Court, Kings County

APPLICATION OF THE

SECOND ADDITIONAL GRAND JURY of the COUNTY OF KINGS for the SEPTEMBER 1961 TERM, AS EXTENDED, to Direct the Witness Samuel D. Carthan, to comply with the Subpoena Duces Tecum Served Upon Him by Said Grand Jury.

SUPREME COURT

CRIMINAL COURT, KINGS COUNTY,

PART 1. OCT. 25, 1962.

Edward S. Silver, Dist. Atty., by *Aaron E. Koota* and *Irvin P. Seidman*, Asst. Dist. Attys., Brooklyn.

Evseroff, Newman & Sonenshine, Brooklyn, for Witness.

MILES F. McDONALD, Justice.

Motion for an order directing the witness herein, Samuel D. Carthan, to produce before the second additional Grand Jury of the County of Kings for the September 1961 Term, as extended, copies of his Federal and State income tax returns for the years 1959, 1960 and 1961, granted.

The question of law, sub judice, is whether or not a witness duly subpoenaed before a Grand Jury, conducting a proper inquiry, who has executed a limited waiver of immunity and submitted a financial questionnaire, be compelled to produce copies of his State and Federal income tax returns.

The Grand Jury is seeking to determine whether the crimes of conspiracy, bribery, corruption and other crimes

have been committed by certain builders, contractors and public officials. The witness is a plaster inspector, employed by the Building Department of the City of New York in Kings County. The witness appeared before the Grand Jury and executed a limited waiver of immunity as provided by law. He has executed a financial questionnaire which required him to list, among other things, his assets and liabilities and living expenses for the years 1959, 1960 and 1961. The questionnaire has been completed and returned to the Grand Jury by the witness. At the present time an investigation is being conducted by the Grand Jury to ascertain the validity of the answers to the witness' questionnaire, to determine whether said answers are, in fact, the truth. The Grand Jury during the course of the investigation made a demand upon the witness that he produce his Federal and State income tax returns for the years, 1959, 1960 and 1961, so that a comparison could be made between said income tax return and the answers given by the witness on the financial questionnaire. This the witness has refused to do.

It is not disputed that the Grand Jury is conducting a proper inquiry and the issuance of a subpoena duces tecum by a Grand Jury is within its powers and must be complied with by a witness if the demand has not been duly burdensome and the documents sought are in any way relevant to the Grand Jury's inquiry. The propriety of requiring a witness to furnish the Grand Jury with financial questionnaires has been established in People ex rel. Silliphant v. Sheriff of City of New York, 6 N. Y. S. 2d 487, 190 N. Y. S. 2d 641, 160 N. E. 2d 890.

There is no question in the court's mind that the records sought are relevant to the Grand Jury's investigation. However, the witness claims that to require him to pro-

duce his income tax returns would constitute a violation of the witness's rights to due process of law as guaranteed by the New York State and Federal Constitutions. The witness further claims that pursuant to the provisions of Section 384 of the State Tax Law and Section 6103, Title 26, of the Internal Revenue Code, the information contained in an income tax return shall be kept secret and not divulged.

However, the secrecy imposed by these sections only prohibits disclosures by officers of the Government or the State, except in accordance with proper judicial order or as otherwise provided by law, not by the taxpayer himself. (United States v. O'Mara, D. C., 122 F. Supp. 399).

The intent and purpose of Section 6103, supra, is to prevent the disclosure of confidential information to those who do not have a legitimate interest in it. (Application of Umbach, Okl., 350 P. 2d 299). The same holds true of Section 384 of the Tax Law of the State of New York.

Furthermore, the witness, having signed a waiver of immunity, cannot raise the question of self incrimination. Once there is a waiver the only question is relevancy and materiality. A reading of the limited waiver discloses that the witness, by executing such waiver, waive all benefits, privileges, rights and immunity, relating to any matter, transaction or things, concerning his conduct in office for the performance of his official duties. By executing such waiver in advance of giving testimony or producing evidence, the witness renounced his fundamental rights and privileges guaranteed to him by the Constitution that no person shall "be compelled in any criminal case to be a witness against himself." (Matter of Grae, 282 N. Y. 428, 26 N. E. 2d 963, 127 A. L. R. 1276).

Appendix B

The witness has testified under oath that he has copies of the income tax return requested by the Grand Jury. No hardship will be created by the production of these documents which are relevant and material to the matter pending before the Grand Jury. As stated in Matter of Manning v. Valente, 272 App. Div. 358, 361, 72 N. Y. S. 2d 88, 92:

> "Nor may petitioner refuse to produce documents and records under a subpoena duces tecum unless he can show that the documents are so unrelated to the subject of inquiry as to make it obvious that their production would be futile as an aid to the court."

Certainly it cannot be argued that the documents requested are not related to the subject of the inquiry and would not be an aid to the Grand Jury in its investigation.

Settle order in accordance with the terms of this decision which shall provide that the witness produce before the Grand Jury copies of his Federal and State income tax returns for the years 1959, 1960 and 1961, on a date to be fixed in said order.

APPENDIX C

Fifth Amendment, United States Constitution

"No person * * * shall be compelled in any criminal case to be a witness against himself, * * *"

Fourteenth Amendment, United States Constitution

"Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

§1123, New York City Charter

"Failure to Testify—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Appendix C

§384, New York State Tax Law.

"Secrecy required of official; penalty for violation.—1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner, any officer or employee of the department of taxation and finance, any person engaged or retained by such department on an independent contract basis, or any person who, pursuant to this section, is permitted to inspect any report or return or to whom a copy, an abstract or a portion of any report or return is furnished, or to whom any information contained in any report or return is furnished, to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this article. The officers charged with the custody of such reports and returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the tax commission in an action or proceeding under the provisions of this chapter to which it is a party, or on behalf of any party to any action or proceeding under the provisions of this article when the reports or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said reports or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return or report filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or the inspection by the attorney-general or other

legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted in accordance with the provisions of sections three hundred eighty and three hundred eighty-one of this chapter; or the inspection of the reports or returns required under this article by the comptroller or duly designated officer or employee of the state department of audit and control, for purposes of the audit of a refund of any tax paid by a taxpayer under this article. Reports and returns shall be preserved for three years and thereafter until the tax commissioner orders them to be destroyed."

§6103, United States Code

"§6103. Publicity of returns and lists of taxpayers

"(a) Public record and inspection.—

"(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

"(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B, C, and D of chapter 33, and subchapter B of chapter 37, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

"(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

"(b) Inspection by states.—

"(1) State Officers.—The proper officers of any State may, upon the request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of any corporation, at such times and in such manner as the Secretary or his delegate may prescribe.

"(2) State bodies or commissions.—All income returns filed with respect to the taxes imposed by chapters 1, 2, 3, and 6 (or copies thereof, if so prescribed by regulations made under this subsection), shall be open to inspection by any official, body, or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purpose of such administration or for the purpose of obtaining information to be furnished to local taxing authorities as provided in this paragraph. The inspection shall be permitted only upon written request of the governor of such State, designating the representative of such official, body, or commission to make the inspection on behalf of such official, body, or commission. The inspection shall be made in such manner, and at such times and places as shall be prescribed by regulations made by the Secretary or his delegate. Any information thus secured by any official, body, or commission of any State may be used

only for the administration of the tax laws of such State, except that upon written request of the governor of such State any such information may be furnished to any official, body, or commission of any political subdivision of such State, lawfully charged with the administration of the tax laws of such political subdivision, but may be furnished only for the purpose of, and may be used only for, the administration of such tax laws. * * *"

APPENDIX D

Petition for Writ of Habeas Corpus

To the District Court of the United States for the Eastern District of New York

The Petition of SAMUEL D. CARTHAN, respectfully shows:

1. That he is the applicant above named and is now imprisoned and restrained of his liberty by the Sheriff of the City of New York in the State of New York, County of Kings.

2. That the cause or pretense of such imprisonment and restraint according to the best knowledge and belief of your petitioner is an order of the Hon. Miles F. McDonald, a Justice of the Supreme Court of the State of New York, in and for the County of Kings, made on the 17th day of December, 1962, adjudging petitioner guilty as and for a criminal contempt of Court, pursuant to Section 619 of the Code of Criminal Procedure and Section 750 et seq., of the Judiciary Law and sentencing him to a term of imprisonment as follows: 30 days or fine of $250.00 and 30 days.

3. That said order has been affirmed on appeal to the Appellate Division of the Supreme Court, Second Judicial Department on the 18th day of March, 1963 and thereafter on May 16, 1963 the Court of Appeals of the State of New York denied an application for leave to appeal to that Court from the order of affirmance of the aforesaid Appellate Division. A prior application for a writ of habeas corpus was dismissed by order of that Court, dated December 17, 1962.

Appendix D

4. Accordingly, your petitioner respectfully submits that all remedies available in the Courts of the State of New York have been exhausted.

5. The underlying facts leading to the issuance of the aforesaid application of criminal contempt of Court are as follows:

6. The Second Additional Grand Jury of the County of Kings, for the September, 1961 term, as extended, commenced an inquiry to determine whether the crimes or conspiracy or other crimes were committed in connection with the construction of certain real property in the County of Kings.

7. That petitioner is a plastering inspector employed by the Building Department of the City of New York for Kings County.

8. That petitioner was subpoenaed to appear before said Grand Jury and, pursuant to Section 903 of the New York City Charter, executed a limited waiver of immunity and submitted pursuant to the direction of the Grand Jury, financial questionnaires for the years 1959, 1960 and 1961.

9. Thereafter, petitioner was served with a subpoena duces tecum directing him to produce before said Grand Jury, copies of his Federal and New York State income tax returns for the years 1959, 1960 and 1961. On September 24, 1962 he appeared before the Grand Jury in response to said subpoena duces tecum but stated to the Grand Jury that upon the advice of counsel he respectfully declined to produce such returns for the reason that he was informed and believed that said Grand Jury had no legal power to

compel their production, in that such a direction violated his constitutional privilege against self-incrimination and would further violate his rights to due process of law and equal protection of the laws and further, that said tax returns were confidential communications between the said petitioner and the Federal and State tax authorities which he was not legally bound to disclose. Petitioner further stated to the Grand Jury that the waiver of immunity executed by him, was executed under duress and compulsion in that failure to execute same would result in a discharge of his position as an inspector in the Department of Buildings of the City of New York, and a loss of property rights which would otherwise have accrued to his benefit by reason of his participation in the pension plan provided for him. At that time, petitioner informed the Grand Jury that he was advised by counsel that the aforesaid Section 903 of the New York City Charter was unconstitutional in that it violated his constitutional privilege against self-incrimination and would deprive him of due process of law and equal protection of the laws and that said section was arbitrary and discriminatory.

10. That thereafter on the 16th day of October, 1962 the District Attorney of Kings County made application before Hon. Miles F. MacDonald, a Justice of the Supreme Court in Kings County, at a Criminal Term, Part 1 thereof, for an Order directing petitioner to produce the aforesaid tax returns. After hearing argument thereon said Justice Miles F. MacDonald made and entered an Order directing petitioner to produce said returns before said Grand Jury. That thereafter, and on the 21nd day of November, 1962, petitioner returned to said Grand Jury and again respectfully declined for the reasons aforesaid to produce said tax returns.

Appendix D

11. That thereafter as alleged herein, petitioner was adjudged guilty of a criminal contempt and sentenced as hereinabove set forth.

12. That the imprisonment and restrained of petitioner as aforesaid is illegal and unlawful and among other things is in violation of his rights under the fifth and fourteenth amendments of the Constitution of the United States.

13. That no previous application has been heretofore been made to any Federal Court or judge for the relief herein sought.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued directed to the Sheriff of the City of New York, State of New York, County of Kings commanding to have the body of petitioner Samuel D. Carthan, together with the cause of such imprisonment and restraint forthwith before the Court or officer granting said writ.

SAMUEL D. CARTHAN

(Sworn to by Samuel D. Carthan on November 15, 1963.)

APPENDIX E

Title 28, United States Code

"§2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by * * * the district courts * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless— * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *"

"§2254. State custody; remedies in State Courts

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."